Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Petition of NuVox, Inc. for Declaratory Ruling	)	

JOINT REPLY COMMENTS OF WORLDCOM, INC. AND THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

I. Introduction

In initial comments filed on July 3, 2002, WorldCom, Inc. (WorldCom) and the COMPETITIVE TELECOMMUNICATIONS ASSOCIATION (CompTel) (Joint Commenters) supported NuVox's petition for a declaratory ruling that a multi-state request to audit every special access circuit converted by a competitive local exchange carrier (CLEC) to an unbundled network element (UNE) loop-transport combination (a.k.a. EEL), without any disclosure of a particularized concern of non-compliance with the safe harbor rules, does not fall within the limited audit process established by the Commission in the *Supplemental Order Clarification*.[1] Joint Commenters also supported NuVox's request for a declaration that a so-called "auditor" that touts its "success" in using audits as a means to enhance ILEC revenues, does not qualify as an independent auditor as required by the *Supplemental Order Clarification*. Initial comments filed by other supporters and

[1] In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, *Supplemental Order Clarification* (rel. June 2, 2000).

opponents of NuVox's petition confirm not only that the Commission should grant that petition, but that the Commission should also establish a moratorium on all local-usage audits until significant uncertainty over the future of the use restriction is resolved.

BellSouth and the other opponents of NuVox's petition appear to believe that the *Supplemental Order Clarification* gives incumbent local exchange carriers (ILECs) *carte blanche* to seek audits when they have no concern whatsoever regarding the compliance of a particular EEL with the safe harbor rules. Indeed, one commenter even asserts that random audits are permissible. These commenters misunderstand utterly the limited audit rights allowed under the *Supplemental Order Clarification*. A declaratory ruling is the most effective way to clear up their confusion.[2]

NuVox's opponents provide no reason to conclude that it is permissible, under the Commission's rules, for a party that gauges an audit's success by its efficacy in generating ILEC revenue to perform an EEL audit. Indeed, they do not even address this issue. Instead, they simply insist that the fact that a company and its employees have worked for ILECs does not necessarily disqualify them from performing EEL audits. The Joint Commenters agree. But there can be no defense of the independence of an auditor that measures "success" in so one-sided a fashion.

In these reply comments, the Joint Commenters address the claims made by the opponents of NuVox's petition. We show that their arguments are unfounded in every relevant particular. We urge the Commission to grant NuVox's petition in accordance with our initial comments and to establish a moratorium on all local-usage audits.

[2] Their confusion show why the comments of USTA are misplaced in suggesting that a declaratory ruling is inappropriate. There is plainly a widespread misunderstanding among ILECs regarding the audit rights established in the *Supplemental Order Clarification.*

II. The *Supplemental Order Clarification* does not require CLECs to cooperate in an EEL audit when the ILEC fails to articulate a colorably legitimate basis for its concern.

BellSouth and its supporters seem to believe that some aspect of the *Supplemental Order Clarification* compels CLECs to cooperate in facially unlawful EEL audits. According to BellSouth, its only obligation "was to provide NuVox with thirty days notice of its intent to commence an audit."[3] This is absurd. The *Supplemental Order Clarification* explicitly states that *the only time* that an ILEC may *request* an audit is when it has a concern that the requesting carrier has not met the criteria for providing a significant amount of local exchange service.[4] BellSouth apparently views this right to request an audit as a right to demand an audit. The Commission should clarify that it meant what it said: an ILEC may request an audit only when it has a concern that a carrier's request for conversion did not comply with the relevant criteria.[5]

The possibility that a CLEC might decline to cooperate in a facially unlawful EEL audit induces great (but needless) consternation on the part of NuVox's opponents. According to BellSouth, such an action "ignores the fundamental balance that the *Supplemental Order Clarification* struck between CLEC and ILEC interests."[6] Echoing this sentiment, Sprint, from its self-anointed "unique perspective", declares that it "appreciates – perhaps better than other carriers – the balance that the Commission drew

[3] BellSouth Opposition (filed June 3, 2002) at ¶ 8.
[4] *Supplemental Order Clarification*, ¶ 31, footnote 86.
[5] As a matter of logic, since conversion requests are made on a circuit-by-circuit basis, audit requests should also be made on such a basis. Moreover, as NuVox argues in its Reply, the Commission surely did not intend to allow ILECs to request an audit when they have concerns that are illegitimate and not bona fide. NuVox Reply at 6.
[6] BellSouth Opposition at ¶ 3.

in the *Supplemental Order Clarification* between the rights of CLECs and ILECs."[7] Sprint goes on to say that NuVox, by refusing to cooperate in an unfounded audit request would somehow "upset that balance."[8] And SBC claims that NuVox would "effectively prevent[ ] ILECs from exercising their rights."[9] This is all nonsense.

If BellSouth or another ILEC exercises its right to request an EEL audit, and the CLEC unreasonably refuses to cooperate, the ILEC has a remedy. It can initiate a complaint proceeding with the Commission pursuant to Section 208 of the Communications Act. In this case, such a complaint would necessarily fail. NuVox was well within its rights to refuse to cooperate with an audit request when BellSouth failed to articulate even a colorably legitimate basis for any concern of non-compliance with the use restriction.

III. There is no reason to expand the ILECs' audit rights.

BellSouth and its supporters repeatedly claim that the *Supplemental Order Clarification* cannot possibly mean what its says – that ILECs may request an audit only when they have some articulable concern of non-compliance with the safe harbors. Their arguments provide no justification for expanding the ILEC audit rights established in that order, which was based on an *ex parte* filing made by ILECs, including BellSouth and SBC.

BellSouth claims that any requirement that an ILEC articulate a *bona fide* concern would amount to a regulatory Catch-22, since "the ILEC will never be able to obtain

[7] Sprint Opposition at 1. Sprint appears to have come to its "appreciation" only recently. Following the release of this "balanced" order, Sprint intervened on the side of CompTel in its appeal to the U.S. Court of Appeals.
[8] *Id.* at 2.
[9] SBC Opposition at 5.

information demonstrating a 'legitimate' concern unless it conducts an audit."[10] Sprint and SBC also claim that ILEC will never be in a position to have information to support a legitimate concern of noncompliance unless it conducts an audit.[11] These unsupported assertions can provide no basis for allowing ILECs to conduct audits in circumstances where they have no concern of noncompliance.[12]

In the first place, as NuVox has pointed out in its reply, BellSouth (as well as SBC) must have believed, in signing on to the *ex parte* that formed the basis for this order, that there is sufficient information at its disposal that could lead to a legitimate concern of noncompliance.[13] Moreover, there clearly are circumstances in which an ILEC could have a legitimate concern. For example, if the CLEC claimed that it was an end user's exclusive provider of local exchange service, but the ILEC later began providing service to the same customer premise, it might have a legitimate basis for concern. Similarly, if the ILEC found that the CLEC did not have a valid local exchange tariff for the end user's address. Or, the ILEC might discover that the CLEC had not provided emergency services information for the end user's address. One can imagine many other circumstances in which the ILEC would have information that could provide the basis for a legitimate concern of noncompliance. Like so many times before in the EELs proceedings, the ILECs lack any basis for their claims.

SBC alleges that it reasonable to give ILECs the right to audit even when they have no legitimate concern of noncompliance. According to SBC, "because an ILEC can

[10] BellSouth Opposition at ¶ 9.
[11] Sprint Opposition at 5 ("[t]he ILEC ordinarily knows nothing about the traffic passing through those circuits"); SBC Opposition at 5 ("CLECs generally will be the only parties with evidence regarding compliance with the local usage requirements").
[12] Sprint goes so far as to claim that random audits are permissible. Sprint Opposition at 4.
[13] NuVox Reply at 6. It is ironic that the ILECs are now complaining about alleged inconsistencies in this order.

conduct only one audit of a carrier in any calendar year and will bear the cost of the audit, unless the audit finds non-compliance, an ILEC has little, if any, incentive to abuse the limited audit rights established in the *Supplemental Order Clarification*."[14] This is simply false.

ILECs have a very strong incentive to abuse their limited audit rights. In so doing, they signal to CLECs that any attempt to exercise their rights under section 251(c) of the Act will be met with unceasing ILEC opposition. As the joint comments filed by a group of CLECs point out, this continuing campaign against the use of unbundled network elements drives CLECs to rely special access instead, and thereby inflates the ILECs' bottom lines.[15]

Nor is it necessarily true that because ILECs may bear the cost of audits they will not frivolously conduct them. In the first place, it is completely unproven that BellSouth actually would bear the cost of an audit that found compliance. Given its apparent confidence in its ability to find noncompliance, it is conceivable that BellSouth's chosen auditor has agreed to waive its fee if instead it finds compliance.[16] Moreover, the outcome of any audit is highly dependent on the auditor chosen. If ILECs are allowed to retain auditors whose mission is to enhance ILEC revenues, it is highly likely that a finding of noncompliance will follow, regardless of the true state of affairs. In sum, there is no basis for assuming that the ILECs bear any risk of incurring a financial liability by abusing their audit rights.

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[14] SBC Opposition at 6.
[15] Joint Comments of Cbeyond Communications, LLC, ITC^DeltaCom Communications, Inc., KMC Telecom Holdings, Inc., NewSouth Communications Corp., and XO Communications, Inc. ("Cbeyond *et. al.*") at 5.
[16] This possibility also suggests why, despite the ILECs' protests to the contrary, in some situations it might be necessary to review the contract between an ILEC and its chosen auditor in order to evaluate that party's "independence."

IV. Independent auditors do judge not an audit's success by its tendency to result in findings that are beneficial to their clients.

According to BellSouth's chosen auditor, "[o]ur use of experienced personnel has resulted in highly successful and efficient audits and in conjunction with our detailed documentation our LEC clients have recovered millions of dollars."[17] This statement alone must disqualify it from serving as an independent auditor. As Cbeyond *et. al.* point out, a successful audit is one that fairly determines compliance, and cannot be clouded by the specter of potential or probable bias.[18] An auditor with so tilted a view of success plainly cannot meet the standards established by the American Institute of Certified Public Accountants for auditor independence, on which the Commission has previously relied.

BellSouth and its supporters seek to defend this entity by asserting that the fact that an auditor and its employees have previously worked for ILECs cannot disqualify it from serving as an independent auditor. Joint Commenters agree that, in theory, an entity with substantial experience working for ILECs might be able to serve as an independent auditor. But the independence of this entity appears to have been impaired sufficiently that it cannot serve as an independent auditor.

BellSouth also claims that it chose this entity based on its experience in conducting EEL audits. However, Sprint, the other ILEC that has retained this entity to perform an EEL audit, has admitted that that audit has not yet begun.[19] Thus, BellSouth

[17] NuVox Reply, Attachment B, February 20, 2002 American Consultants Alliance Proposal for an Examination and Report to Determine the Compliance with the FCC Supplemental Order, Docket No. 96-98 for Carrier's Converting From BellSouth's Special Access Tariff Rates to Unbundled Network Element Rates.
[18] Cbeyond *et. al.* at 8.
[19] Sprint Opposition at 5.

is simply wrong in alleging that, because of its experience, this entity would be able to conduct an EEL audit more efficiently than a truly independent party.

V. The Commission should suspend all "local-usage" audits immediately.

In our initial comments, we showed that the Commission should suspend EEL audits until a number of issues are finally resolved. Based on initial comments, it is clear that this suspension must be expanded to include all audits of local usage.

Apparently, BellSouth has sought to initiate local usage audits of facilities to which the safe harbor rules have no application. According to Cbeyond *et. al.*, BellSouth has issued several audit requests that notice its intent to include unbundled loops and "new" EELs in the audit.[20] There is no basis whatsoever for such requests. The *Supplemental Order Clarification* and its safe harbor rules apply only to pre-existing loop-transport combinations that are converted from special access to UNEs. The Commission should put a stop to this behavior by suspending all local usage audits.

Respectfully submitted,

/s/
Jonathan Lee
Vice President, Regulatory Affairs
COMPETITIVE TELECOMMUNICATIONS ASSOCIATION
1900 M Street, N.W., Suite 800
Washington, D.C. 20036-3508
202.296.6650

Attorney for the Competitive Telecommunications Association

/s/
Henry G. Hultquist
WorldCom, Inc.
1133 19th Street, N.W.
Washington, D.C. 20036
202.736.6485

Attorney for WorldCom, Inc.

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[20] Joint Comments at 2.